



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Board of Medicine/Department of Health Professions
VAC Chapter Number:	18 VAC 85-80-10 et seq.
Regulation Title:	Regulations Governing the Practice of Occupational Therapy
Action Title:	Periodic review – supervision of unlicensed persons
Date:	10/22/01

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The board is proposing amendments to its regulations for the licensure of occupational therapists in order to address concerns about the adequacy of supervision for unlicensed assistants and to provide greater clarity about practice by graduates waiting for examination results. Minor changes are proposed for greater accuracy and consistency.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the

Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations, levy fees, administer a licensure and renewal program, and discipline regulated professionals.

§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- 4. To establish schedules for renewals of registration, certification and licensure.*
- 5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*
- 7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations.*
- 8. To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.*
- 9. To take appropriate disciplinary action for violations of applicable law and regulations.*
- 10. To appoint a special conference committee, composed of not less than two members of a health regulatory board, to act in accordance with § 9-6.14:11 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv)*

reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final thirty days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the thirty-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 9-6.14:12, and the action of the committee shall be vacated. This subdivision shall not be construed to affect the authority or procedures of the Boards of Medicine and Nursing pursuant to §§ 54.1-2919 and 54.1-3010.

11. *To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to conduct formal proceedings pursuant to § 9-6.14:12, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 9-6.14:11 shall serve on a panel conducting formal proceedings pursuant to § 9-6.14:12 to consider the same matter.*
12. *To issue inactive licenses and certificates and promulgate regulations to carry out such purpose. Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for reactivation of such licenses or certificates.*

Chapter 29 of Title 54.1 sets forth statutory provisions for the licensure and practice of occupational therapists, excerpts of which are listed below:

§ 54.1-2900. Definitions.

As used in this chapter, unless the context requires a different meaning:

"Practice of occupational therapy" means the evaluation, analysis, assessment, and delivery of education and training in activities of daily living (ADL); the design, fabrication, and application of orthoses (splints); guidance in the selection and use of adaptive equipment; therapeutic activities to enhance functional performance; prevocational evaluation and training; and consultation concerning the adaptation of physical environments for individuals who have disabilities.

§ 54.1-2956.1. Powers of Board concerning occupational therapy.

The Board shall be empowered to take such actions as may be necessary to ensure the competence and integrity of any person who claims to be an occupational therapist or who holds himself out to the public as an occupational therapist or who engages in the practice of occupational therapy, and to that end it may license practitioners as occupational therapists.

§ 54.1-2956.5. Restriction of titles.

It shall be unlawful for any person not holding a current and valid license from the Board to claim to be an occupational therapist or to assume the title "Occupational Therapist," "Occupational Therapist, Licensed," "Licensed Occupational Therapist," or any similar term, or to assume the designations "O.T." or "O.T.L." However, a person who has graduated from a duly accredited educational program in occupational therapy may practice with the title "Occupational Therapist, License Applicant" or "O.T.L.-Applicant" until he has taken and received the results of any examination required by the Board or until one year from the date of graduation, whichever occurs sooner. This section shall not be construed to

prohibit any person operating under the supervision of an occupational therapist pursuant to such requirements as may be imposed by the Board from claiming to practice occupational therapy or from using the title "Certified Occupational Therapy Assistant" or any variation thereof, or from assuming the designations "O.T.A." or "C.O.T.A."

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

Licensed occupational therapists and health care facilities often have a dilemma about what tasks constitute the practice of occupational therapy and what tasks may be appropriately delegated. The purpose of the amended regulation is to provide more specificity about delegation, emphasizing the responsibility of the licensee for the patient and the outcome of treatment. While the proposed regulation is specific enough to prohibit the initial assessment, evaluation or development of a treatment plan, it is general enough to permit delegation of tasks based on the knowledge and skills of the unlicensed assistant. It also requires that delegated tasks or procedures must be communicated on a patient-specific basis with specific, clear instruction and expectations.

Since the licensed occupational therapist is responsible for the unlicensed personnel who work under his supervision, he must use his judgment about whether a task can safely and properly be performed. No delegation of tasks may occur if such delegation may jeopardize the health, safety and welfare of the patient. By providing greater regulatory clarity on delegation, the Board intends to protect patients from inappropriate treatment by unlicensed, unsupervised individuals engaged in activities that may be interpreted as the licensed practice of occupational therapy.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The board is recommending amendments to its regulations for the licensure of occupational therapists in order to address concerns about the adequacy of supervision for unlicensed assistants and to provide greater clarity on appropriate delegation of tasks. An amendment will also clarify for applicants the time period in which they may practice prior to getting the results of the licensure examination.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary issue that arose in the review of these regulations related to the appropriate use of unlicensed assistants in practice. The Code of Virginia permits practice by unlicensed assistants but also restricts the practice of occupational therapy as defined in § 54.1-2900 to persons who hold a license from the Board. Licensees often have a dilemma about what tasks constitute practice and what tasks may be appropriately delegated. By further specifying the regulation on supervision and delegation of tasks to unlicensed persons, the Board intends to provide greater clarity and protection for the public.

Advantages and disadvantages to the public:

There are no disadvantages to patients receiving occupational therapy services; they are better protected by more specific rules on delegation of tasks to unlicensed persons. Amended regulations will make it clear that the initial assessment of a patient and the development of a treatment plan shall only be done by the licensed OT. Only those routine tasks that can properly and safely be performed by unlicensed personnel can be delegated and shall be delegated on a patient-specific basis. The licensed individual remains responsible for the services provided and for the treatment of the patient.

Advantages and disadvantages to the agency or the Commonwealth:

There are no disadvantages to the agency; the amended regulation does not impose a new responsibility on the Board and does not involve additional cost or staff time. In part, the amended regulation is intended to clarify certain sections that have generated phone calls and questions to staff. If the Board is successful in clarifying those provisions, the agency could benefit from fewer inquiries from applicants and licensees.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

Projected cost to the state to implement and enforce:

(i) Fund source: As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation.

(ii) Budget activity by program or subprogram: There is no change required in the budget of the Commonwealth as a result of this program.

(iii) One-time versus ongoing expenditures: The agency will incur some one-time costs (less than \$1,000) for mailings to the Public Participation Guidelines mailing lists, conducting a public hearing, and sending copies of final regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and Board meetings already scheduled.

Projected cost on localities:

There are no projected costs to localities.

Description of entities that are likely to be affected by regulation:

The entities that are likely to be affected by these regulations would be licensed occupational therapists and unlicensed persons who work as occupational therapist assistants or aides.

Estimate of number of entities to be affected:

Currently, there are approximately 1,950 persons licensed to practice occupational therapy.

Projected costs to the affected entities:

There are no projected costs to the affected entities.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

Throughout the regulation, the word “licensure” has been inappropriately used and is being correctly replaced with the word “license.”

18 VAC 85-80-26. Fees.

Fees are currently established in section 120 of these regulations. For consistency with other regulations under the Board, it is proposing to move the regulations on fees to Part I. General Provisions. Fees are identical to those currently in effect.

18 VAC 85-80-40. Educational requirements.

An amendment in subsection C would clarify that “current” certification by NBCOT is required for those applicants who do not meet the educational requirements prescribed in this section.

18 VAC 85-80-41. New section on practice while awaiting examination results.

Based on a recommendation from staff members who often receive inquiries from applicants, the Board proposes that a new section be added to clarify the conditions by which an applicant can practice occupational therapy while waiting the examination results, consistent with § 54.1-2956.5 of the Code of Virginia.

18 VAC 85-80-60. Practice requirements.

The “active practice” of occupational therapy is defined in section 10. The proposed amendment in section 60 eliminates a redundant and unnecessary phrase.

18 VAC 85-80-70. Biennial renewal of licensure.

The “active practice” of occupational therapy is defined in section 10. The proposed amendment in section 60 eliminates a redundant and unnecessary phrase.

18 VAC 85-80-110. Supervisory responsibilities.

Amendments to regulations are recommended to clarify the supervisory responsibilities in response to concerns about the appropriate functions for unlicensed assistive personnel. The Board proposes provisions that will ensure that the licensed occupational therapist is responsible and accountable for the services provided by occupational therapy personnel under his supervision. The O.T. may not delegate initial assessment, evaluation or the development of a treatment plan. Clinical decision and tasks that require professional knowledge and judgment should not be delegated to unlicensed assistants.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

Supervision of unlicensed persons to ensure compliance with law and regulation and provide for public protection:

To provide greater regulatory clarity on the issue of delegation and supervision of unlicensed occupational personnel, the Board has reviewed a variety of laws and regulations. The Virginia Occupational Therapy Association provided the “Model State Regulation for Supervision of Occupational Therapy Assistants and Aides” and the “Guide for Supervision of Occupational

Therapy Personnel in the Delivery of Occupational Therapy Services” published by the American Occupational Therapy Association. While instructive and useful in a discussion of supervision and delegation, the model is not totally applicable to Virginia because it contemplates a level of licensed occupational therapy assistants. In Virginia, there is no distinction in the law between certified OT Assistants and unlicensed personnel.

From guidance on supervision by other professions, the Board reviewed regulations of the Board of Nursing for delegation of certain tasks to unlicensed persons and laws under the Board of Medicine. While the nursing regulations are more extensive than is required for this Board, there are several provisions that are applicable in assuring the appropriate delegation of a task to an unlicensed person. Those regulations specify that tasks and level of supervision must be appropriate to the level of competency of the licensed person and consistent with other related factors. Likewise, the Board considered incorporation of language similar to that governing the use of unlicensed persons by licensees in the medical profession in § 54.1-2901 of the Code of Virginia. Under exceptions to the practice of medicine, the Code permits delegation of activities or functions that are non-discretionary and do not require the exercise of professional judgment and are normally and customarily delegated by practitioners of the healing arts. Such a standard may serve to provide clarity to the issue of delegation and practice of unlicensed persons in the practice of occupational therapy.

To address issues related to the competency and use of unlicensed persons in practice, the Board has considered a variety of possible actions. It has considered the possibility of legislative actions to regulate assistants, so there would be some measure of their competency and recourse for their actions. A 2000 study by the Board of Health Professions was conducted, and there would appear to be insufficient evidence of risk of harm to warrant licensure of these persons, provided they are appropriately supervised in the performance of delegated tasks that are commensurate with their training. Therefore, the Board is not recommending regulation or licensure of assistants but rather clarification of its regulation on supervision.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

An announcement of the board's intent to amend its regulations was posted on the Virginia Regulatory Townhall, sent to the Registrar of Regulations, and sent to persons on the PPG mailing list for the board. Public comment was received until June 20, 2001. During the 30-day comment period, no comments were received from members of the public. However, the Advisory Board considered comment received during the periodic review of regulations from the Virginia Occupational Therapy Association related to the model practice act and provisions for supervision of assistants of the American Occupational Therapy Association.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The Advisory Board on Occupational Therapy, comprised of licensed occupational therapists, a physician and a public member met to work on draft regulations. The regulations were also reviewed and approved by the Legislative Committee of the Board prior to adoption on October 11, 2001. The Assistant Attorney General who provides counsel to the Board has been involved during the development and adoption of proposed regulations to ensure clarity and compliance with law and regulation.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

Public participation guidelines require the Board to review regulations each biennium or as required by Executive Order. Regulations will be reviewed again during the 2003-04 fiscal year.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

In its preliminary analysis of the proposed regulatory action, the agency has determined that there is no potential impact on the institution of the family and family stability and would not result in an increase or decrease in disposable family income.